Supreme Court, U.S.
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No. 93-1332

In The

Supreme Court of the United States

October Term, 1993

JIM VANOVER and KEITH SHOTWELL,

Petitioners,

v.

MONIQUE LAMPKIN and CHARLES R. DANIELS, JR.,

Respondents.

On Petition For Writ Of Certiorari To The United States Court Of Appeals For The Fifth Circuit

BRIEF IN OPPOSITION

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QUESTIONS PRESENTED FOR REVIEW:

1. Whether an interlocutory appeal from the denial of summary judgment based on qualified immunity is properly dismissed when material facts directly relevant to the qualified immunity issue are in genuine dispute.

2. Whether the dismissal of the interlocutory appeal following a plenary review of the record is in conflict with other courts of appeal given the genuine dispute with regard to material facts directly relevant to the qualified immunity issue and given that the requirements for a warrantless investigatory stop and the warrantless arrest of a citizen are well established.

3. Whether the dismissal of the interlocutory appeal is in full accord with this Court's jurisprudence given the genuine dispute with regard to material facts directly relevant to the qualified immunity issue and given that the requirements for a warrantless investigatory stop and the warrantless arrest of a citizen are well established.

4. Whether disputed facts bearing directly upon the qualified immunity determination, existed to preclude the Fifth Circuit Court of Appeals from deciding whether petitioners' conduct in stopping and detaining respondents was reasonable in light of clearly established law.

5. Whether the petitioners' conduct in stopping and searching respondents' vehicle and detaining respondents was objectively unreasonable in light of clearly established law precluding petitioners from being shielded by qualified immunity.

QUESTIONS PRESENTED FOR REVIEW: – Continued

6. Whether the Fifth Circuit Court of Appeals in deciding that a genuine dispute with regard to a material fact precluded summary judgment based on qualified immunity followed well established law.

7. Whether the dismissal of an interlocutory appeal based on qualified immunity because of genuine disputes with regard to material facts directly related to the qualified immunity entitlement violates this Court's jurisprudence given the limited scope of review of appeals based on qualified immunity.

8. Whether the dismissal of the interlocutory qualified immunity appeal following a plenary review of the record because of genuinely disputed material facts bearing directly on the qualified immunity issue places an improper burden on petitioners.

LIST OF PARTIES

PETITIONERS:

Jim Vanover
Keith Shotwell

RESPONDENTS

Monique Lampkin
Charles Rayford Daniels, Jr.

Pursuant to Rule 29.1, there are no parent companies or subsidiaries.

Party to judgment in the District Court who has no interest in the outcome of this case;

City of Nacogdoches.

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BRIEF IN OPPOSITION

OPINIONS BELOW

The unanimous opinion of the United States Court of Appeals for the Fifth Circuit sought to be reviewed is *Lampkin v. City of Nacogdoches*, 7 F.3d 430 (1993), a copy of which appears in the petitioners' Appendix A. The Judgment of the United States Court of Appeals for the Fifth Circuit was entered November 18, 1993. The opinion of the United States District Court for the Eastern District of Texas was entered on July 17, 1991, a copy of which appears in the petitioners' Appendix B.

STATEMENT OF JURISDICTION

Petitioners invoke the jurisdiction of this Court pursuant to 28 U.S.C. §1254(1). This Court does not have jurisdiction to resolve genuine disputes with regard to material facts because jurisdiction over interlocutory appeals based on qualified immunity is limited to questions of law. *Mitchell v. Forsyth*, 472 U.S. 511 (1985).

STATEMENT OF THE CASE

Petitioners Jim Vanover and Keith Shotwell are City of Nacogdoches police officers and are defendants. Respondents Monique Lampkin and Charles R. Daniels, jr. are the plaintiffs.

Respondents filed their original Complaint on November 7, 1990 under 42 U.S.C. §1983 alleging in relevant part that Vanover and Shotwell had deprived them of their constitutional right to be free from unlawful arrest, unlawful investigator stop, unreasonable search and seizure, and excessive force. Respondents filed their First Amended Complaint on March 11, 1991. The United States District Court for the Eastern District of Texas had jurisdiction over plaintiffs' 42 U.S.C. §1983 claims under 28 U.S.C. §1331 and 28 U.S.C. §1343(3). Respondents' state law claims were asserted under the district court's pendent jurisdiction as expanded by 28 U.S.C. §1367.

On January 18, 1991 Vanover and Shotwell moved the Court for summary judgment based on qualified immunity. On July 17, 1991 the district court entered a Memorandum Order denying the motion for summary

judgment. Petitioners Vanover and Shotwell appealed the district court's denial of qualified immunity on the issue of respondents' search and seizure claims to the United States Court of Appeals for the Fifth Circuit. The appeal was dismissed in a decision dated November 18, 1993 because genuine material factual disputes precluded the granting of summary judgment based on qualified immunity.

The relevant facts are accurately summarized in *Lampkin v. City of Nacogdoches*, 7 F.3d 430, 431-33 (5th Cir. 1993).

Lufkin Police Detective Harrison and Police Officer Lenderman testified by affidavit. Harrison states that a shooting occurred in Lufkin, Texas on July 1, 1990. He learned during the course of an investigation that some youths from Lufkin were planning to go to Nacogdoches to "get even". Three vehicles were mentioned, to wit a red Camaro, a silver Ford LTD and a blue and white 1978 Nova. He was also able to identify some of the youths from Lufkin that were planning to go to Nacogdoches to "get even." He passed the above information along to the Nacogdoches Police Department because of "the suggestion of the possibility of a revenge drive-by shooting in Nacogdoches by one or more of these individuals".

Officer Lenderman learned that the brother of the deceased victim of the July 1 shooting, driving a blue and white Nova, was traveling to Nacogdoches for the purpose of avenging his brother's death. On July 3, 1990 he provided information to the Nacogdoches Police Department that the suspect, Brian Hamilton, had left fifteen minutes earlier for the purpose of a drive-by shooting in

a blue and white 1978 Nova and that he was in possession of at least a handgun and shotgun.

Both Respondents Lampkin and Daniels testified by affidavit. Both testified that they were in the driveway at their home located in Nacogdoches during the early morning hours of July 5, 1990 when they were arrested at gunpoint, handcuffed, and detained by Petitioner Officers Vanover and Shotwell. The petitioners did not have an arrest warrant and respondents did absolutely nothing to give anybody any reason to stop them, detain them, or arrest them. Further, neither respondent is aware of any reason that the petitioner officers could have to believe that they had violated any law.

Both respondents were arrested and handcuffed for fifteen to thirty minutes before they were unhandcuffed and released without being charged. Neither respondent committed any criminal offense either before or after the arrests. The petitioners proceeded to search Respondent Daniels' automobile while the respondents were under arrest, although the officers did not have a warrant and, to the best of respondents' knowledge, did not have probable cause or any other good reason for searching the car.

The petitioner officers tore up Respondent Lampkin's VCR and slammed Respondent Daniels' head against the car with great force, causing him significant injury, including a lump on the head and bad headaches. It seemed to respondents like the whole police force was at the house waving guns at them and they were not even allowed to check on the kids.

Both respondents testified by affidavit that they have never owned or been a passenger in any automobile that satisfied any of the descriptions provided by the Lufkin Police Department to the Nacogdoches Police Department. To the contrary, respondents were in a white Nova with a black top and gold trim when they were stopped and arrested.

Petitioner Officer Vanover testified by affidavit and deposition and Petitioner Officer Shotwell testified by deposition. Petitioner Officer Vanover admits that the only reason he had for stopping respondents' vehicle was the description of another vehicle that he had received. According to Petitioner Officer Vanover's information, the suspect vehicle was a 1978 blue and white Nova and the suspects were black males.

Petitioner Officer Vanover claims that he learned on July 3, 1990, over twenty-four hours before the stop and detention, of the *possibility* of one or more black persons coming to Nacogdoches for the purpose of seeking revenge for a shooting that occurred in Lufkin. [emphasis added].

Petitioner Officer Vanover admitted that he did not have one whit of information that either Respondent Lampkin or Respondent Daniels had ever violated any law in their lives and that he does not have one whit of evidence that either respondent was in Lufkin at the time of the shooting. Both petitioner officers admit that neither respondent violated any law and that neither respondent engaged in any suspicious activity in their presence. This is also confirmed by Officer Lamonte who was also at the scene. Petitioner Officer Vanover admits that he is the

person who made the decision to stop the vehicle and that neither the vehicle nor its occupants were doing anything suspicious before he stopped it.

Petitioner Officer Vanover admits that after he saw the woman [Respondent Lampkin] he thought it was *probably* not the right car because his information was that the suspects in the car coming from Lufkin were supposed to be males and as soon as the car was stopped he could see that there was a woman in the car. [emphasis added]. Even after Petitioner Officer Vanover saw Respondent Lampkin in the car he still wanted to look inside the car "because I was not *absolutely positive* that was not the car that Lufkin had told us about." [emphasis added]. Petitioner Officer Vanover further admitted that he did not even look in the glove compartment to see if there was a handgun because "like I told you, once we searched the car, I had already decided that these people probably were not going to be the right ones." Petitioner Officer Vanover admits that the trunk and glove compartment were never searched because it was not necessary.

Petitioner Officer Vanover admits that he had no information whatsoever concerning where in Nacogdoches the shooting was supposed to occur, who was supposed to get shot, or when the shooting was supposed to occur. He also admits that he realized there was no blue in the vehicle that he stopped as soon as he stopped it, but he still chose to have respondents get out of the car. Petitioner Officer Vanover also admits that at the time he stopped the vehicle he knew from the report that the suspect vehicle was blue and white and that he did not have one whit of evidence that either respondent was ever down in Lufkin. He admitted that even after he

knew the car was not partially blue, as reported to him to be one of the colors, he still made the respondents get out. Further, Petitioner Officer Vanover admits that he never saw the candy in the passenger compartment that Petitioner Officer Shotwell claimed he saw. Petitioner Officer Vanover also admitted that he cannot tell the difference between a 1978 Nova and Novas manufactured as early as 1973 or as late as 1982. Finally, Petitioner Officer Vanover states that the trunk was never searched because it was not necessary to do so.

Petitioner Officer Vanover knew that the car he was looking for, unlike the car he stopped, was supposed to be licensed to somebody in Lufkin at the moment he stopped it. Finally, Petitioner Officer Vanover claimed that the only reason the vehicle was stopped was because it matched the description of another vehicle that he received, although the Lampkin/Daniels vehicle did not in fact match the description.

Petitioner Officer Shotwell agrees with Petitioner Officer Vanover that the trunk and glove compartment were not searched. Petitioner Officer Shotwell stated that he searched the car because of the "fact that there was a possible weapons [sic] and possibly narcotics in the vehicle, just for my safety and other officers' safety." Petitioner Officer Shotwell also claims that he only searched the passenger compartment and that from the very beginning he was searching for narcotics in addition to weapons. Petitioner Officer Shotwell was also aware that the suspects were black males, unlike Respondent Lampkin who is a female.

Petitioner Officer Shotwell is not able to describe the vehicle. However, he claims to recall Petitioner Officer Vanover stating that there was a *possibility* that the vehicle was the vehicle that they were looking for as the suspect in a drive-by shooting. He also recalled hearing about the possibility of a drive-by shooting a day or days before the incident.

Petitioner Officer Shotwell claims that he saw a candy mint in the car that he thought was "possibly crack cocaine." Upon visual inspection Petitioner Officer Shotwell admits that he determined that the candy was in fact candy without ever testing same or submitting same for chemical analysis.

Petitioner Officer Shotwell admits that he is the person responsible for handcuffing Respondent Lampkin and detaining her. However, Petitioner Officer Shotwell states that at no time did he decide that Respondent Lampkin was not free to go, he never told her she was not free to go, and he never made any conclusion as to whether she was free to go.

REASONS FOR DENYING THE WRIT

I. CERTIORARI SHOULD BE DENIED BECAUSE THIS COURT HAS ALREADY DECIDED THE SCOPE OF REVIEW OF INTERLOCUTORY APPEALS BASED ON QUALIFIED IMMUNITY.

This Court carved out an exception in qualified immunity cases to the general rule that interlocutory orders are not appealable in *Mitchell v. Forsyth*, 472 U.S. 511, 106 S.Ct. 2806, 86 L.Ed. 2d 411 (1985). Specifically, the

Court held that a district court's denial of a claim of qualified immunity is appealable to the extent that it turns on an issue of law. *Id.* U.S. 530, S.Ct. 2817.

This Court in *Siegert v. Gilley*, ___ U.S. ___, 111 S.Ct. 2920 (1991) succinctly set out the method for reviewing interlocutory appeals based on qualified immunity. First, the reviewing court must determine whether the complaint states a cause of action. *Id.* 1793. Second, the reviewing court must determine whether the right was clearly established at the time of the claimed constitutional violation. *Id.* 1793. The review is limited to these purely legal questions. *Id.* 1793.

Factual allegations are examined only to determine whether they would be sufficient, if proven, to make out a violation of clearly established law. *Johnson v. Odom*, 910 F.2d 1273, 1277 (5th Cir. 1990). The denial of summary judgment sought on the basis of immunity is not appealable where disputed factual issues material to immunity are present. *Feagley v. Waddill*, 868 F.2d 1437, 1439 (5th Cir. 1989). Of course, it is conceded in the case at bar that the warrantless arrest of a citizen absent probable cause, the warrantless investigatory stop in the absence of a reasonable suspicion, and the warrantless search and seizure of a citizen's vehicle absent reasonable suspicion all violate well-settled law.

In determining the entitlement to qualified immunity, the reviewing court must ask whether the officers acted reasonably under settled law in the circumstances, not whether another reasonable, or more reasonable, action was possible. *Hunter v. Bryant*, 502 U.S. ___, 112 S.Ct. 534, 536-37, 116 L.Ed.2d 589 (1991). Simply put, qualified

immunity shields officers from a damage suit only if they could have reasonably believed their actions to be lawful in light of clearly established law and the information they possessed. *Hunter, supra,* at 112 S.Ct. 536; *Anderson v. Creighton,* 438 U.S. 635, 641, 107 S.Ct. 3034, 3040, 97 L.Ed.2d 523 (1987).

Of course, it is an elementary principle of black letter law that summary judgment is not available under Rule 56 of the Federal Rules of Civil Procedure when, as in the case at bar, there is a genuine dispute with regard to material facts. As pointed out by the court below, the material facts presented by the victims stand in stark contrast to the material facts alleged by the petitioners and there is even a serious factual dispute among petitioners and their witnesses concerning what information petitioners possessed at the time of the incident. Stated differently, whether petitioners are entitled to qualified immunity turns on what happened. What happened depends on who you believe.

II. CERTIORARI SHOULD BE DENIED BECAUSE THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT FAITHFULLY FOLLOWED THIS COURT'S TEACHINGS IN DISMISSING THE QUALIFIED IMMUNITY APPEAL.

Even a cursory review of the opinion below reveals that the Fifth Circuit faithfully followed applicable law as enunciated by this Court in reviewing the interlocutory qualified immunity appeal. *Lampkin v. City of Nacogdoches,* 7 F.3d 430, 434-36 (5th Cir. 1993).

III. CERTIORARI SHOULD BE DENIED BECAUSE PETITIONERS ARE SIMPLY WRONG WHEN THEY CLAIM THAT THE FIFTH CIRCUIT'S OPINION IS IN CONFLICT WITH OTHER CIRCUITS.

Rule 56 provides in relevant part that summary judgment is inappropriate where there is a genuine dispute with regard to material facts. Not a single circuit court, petitioners' protestations notwithstanding, has ever held that a reviewing court is entitled to resolve core factual disputes where the different versions are supported by substantial evidence. The law regarding warrantless search and seizures of citizens, warrantless investigatory stops, warrantless arrests, and warrantless search and seizures of vehicles was well established at the time of the incident. Stated differently, whether petitioners are entitled to summary judgment based on qualified immunity depends on whether their conduct was objectively reasonable. Whether their conduct was objectively reasonable turns on the information the petitioners possessed at the time of the incident and the petitioners' conduct at the time of the incident. As pointed out by the court below, petitioners' testimony with regard to their conduct stands in stark contrast to the victims' testimony regarding what the petitioners did. *Lampkin v. City of Nacogdoches*, 7 F.3d 430, 431-33 (5th Cir. 1993).

Of course, no reviewing court can resolve this credibility dispute. Further, the knowledge that petitioners had in their possession at the time of the incident is also in serious dispute, even between petitioners.

IV. CERTIORARI SHOULD BE DENIED BECAUSE THE COURT OF APPEALS PROPERLY IDENTIFIED THE FACTUAL DISPUTES WHICH PRECLUDED SUMMARY JUDGMENT.

Petitioners baldly assert that the court below erroneously dismissed the interlocutory appeal due to a perceived but unidentified factual dispute. In fact, the court below set out in detail the genuinely disputed material facts that are directly related to the qualified immunity issue. *Lampkin v. City of Nacogdoches*, 7 F.3d 430, 431-33 (5th Cir. 1993)

V. CERTIORARI SHOULD BE DENIED BECAUSE PETITIONERS DISTORT THE BASIS OF THE LOWER COURT'S OPINION.

Petitioners baldly state that the court of appeals dismissed the interlocutory appeal "due to a perceived but unidentified factual dispute". Reasons for granting the writ, I. The truth is that the court below conducted a plenary review of the record, *Lampkin v. City of Nacogdoches*, 7 F.3d 430, 431 n. 3 (5th Cir. 1993), and discussed in detail the facts directly related to the qualified immunity issue that precluded summary judgment at 431-33.

VI. CERTIORARI SHOULD BE DENIED BECAUSE PETITIONERS DISTORT THE FACTS.

The facts set out in the Petition for Writ of Certiorari, Statement of the Case, p. 2-6 resolve all genuine disputes concerning material facts favorable to petitioners and ignore significant facts favorable to the victims, contrary

to basic summary judgment law. Compare petitioners' Statement of the Case with respondents' Statement of the Case. Also compare petitioners' Statement of the Case with the disputed material facts recognized by the court below in *Lampkin v. City of Nacogdoches*, 7 F.3d 430, 431-33 (5th Cir. 1993).

VII. CERTIORARI SHOULD BE DENIED BECAUSE PETITIONERS ARE NOT SHIELDED BY QUALIFIED IMMUNITY GIVEN THAT THEIR CONDUCT VIOLATED WELL-SETTLED LAW.

A. Law

As our Supreme Court has succinctly stated:

> No right is held more sacred, or is more carefully guarded, by the common law, than the right of every individual to the possession and control of his own person, free from all restraint or interference of others, unless by clear and unquestionable authority of law.

Terry v. Ohio, 392 U.S. 1, 9, 88 S.Ct. 1868, ___, 20 L.Ed.2d 889, 898 (1968) quoting *Union Pac. R. Co. v. Botsford*, 141 U.S. 250, 251, 35 L.Ed. 734, 737, 11 S.Ct. 1000 (1891).

It is crystal clear that the unlawful arrest of a citizen by law enforcement officials amounts to a deprivation of liberty without due process of law in violation of the Fourteenth Amendment to the United States Constitution. *Gerstein v. Pugh*, 420 U.S. 103, 95 S.Ct. 854, 43 L.Ed.2d 54, (1975); *Terry v. Ohio*, 392 U.S. 1, 9, 88 S.Ct. 1868, ___, 20 L.Ed.2d 889, 898 (1968); *Beck v. Ohio*, 379 U.S. 89, 85 S.Ct. 223, 13 L.Ed.2d 142 (1964); *Kersh v. Derozier*, 851 F.2d 1509 (5th Cir. 1988).

On July 5, 1990 at the time petitioners arrested the victims it was well settled law that policemen, absent an arrest warrant, could not arrest citizens unless the citizens had committed an offense or were committing an offense in petitioners' presence. The arrest must be supported by probable cause even if exigent circumstances preclude the obtaining of an arrest warrant.

Probable cause depends "upon whether, at the moment the arrest was made, . . . the facts and circumstances within [petitioners] knowledge and of which they had reasonably trustworthy information were sufficient to warrant a prudent man in believing that the [citizen] had committed or was committing an offense." *Beck v. Ohio*, 379 U.S. 89, 91 (1964)

It is also clear that an investigatory stop in the absence of a reasonable suspicion of criminal activity violates well-settled law. A law enforcement officer is required to have a "reasonable suspicion of criminal activity" before he is permitted to make a "Terry stop". *Delaware v. Prouse*, 440 U.S. 648, 663, 99 S.Ct. 1391, 1401, 59 L.Ed.2d 660, ___ (1979); *Brown v. Texas*, 443 U.S. 47, 99 S.Ct. 2637, 61 L.Ed.2d 357 (1979). In order to warrant an investigative stop, the "reasonable suspicion" must be based on specific and articulable facts which, taken together with rational inferences from those facts, reasonably warrant the intrusion and the facts must be judged against an objective standard. In *United States v. Gomez*, 776 F.2d 542 (5th Cir. 1985) the standard was articulated as follows:

> A valid investigatory stop under *Terry* and its progeny, in simplest terms, requires a reasonable conclusion by the police officer, in light of

> his experience, that some kind of criminal activity is taking place. Reasonable suspicion must be based on 'specific and articulable facts which, taken together with rational inferences from those facts, reasonably warrant that intrusion.' Finally, these facts must 'be judged against an objective standard: would the facts available to the officer at the moment of [the] seizure . . . warrant a man of reasonable caution in the belief' that the action taken was appropriate?

Gomez, 776 F.2d at 546 quoting, *Terry v. Ohio*, 392 U.S. at 21, 88 S.Ct. at 1880, 20 L.Ed.2d at 906 (citations and footnotes omitted). See also, *United States v. Lopez-Gonzalez*, 916 F.2d 1011, 1013 (5th Cir. 1990).

The Court in *Terry* made several observations concerning investigative stops that are of importance in the case at bar in the event this Court is inclined to treat the victims' arrest as an investigative stop. First, the Court made it clear that it was not indicating approval of police misconduct outside the legitimate investigative sphere. *Terry v. Ohio*, 392 U.S. 1, 15, 20 L.Ed.2d 809, 902, 88 S.Ct. 1868, ___ (1968). Second, the focus is a dual one – whether the officer's action is justified at the inception and whether it is related in scope to circumstances which justify it in the first place. *Id.*, 392 U.S. at 20, 20 L.Ed.2d at 905, 88 S.Ct. at ___. Third, subjective good faith alone is not sufficient to support a *Terry* stop and a *Terry* stop must be based on something more substantial than hunches. *Id.*, 392 U.S. at 22, 20 L.Ed.2d at 906, 88 S.Ct. at ___. Finally, a search for weapons in the absence of probable cause to arrest must be strictly circumscribed by the exigencies which justify the initiation. *Id.*, 392 U.S. at 25-26, 20 L.Ed.2d at 908, 88 S.Ct. at ___.

B. Law Applied to Facts

It is conceded that there is no bright line test for determining precisely the difference between an arrest and an investigatory stop. It is uncontroverted that the victims were handcuffed at gunpoint and detained for several minutes by petitioners. These facts certainly support the victims' claim that they were arrested. To deprive a person of his liberty by legal authority is a not wholly satisfactory definition of an arrest provided by Black's Law Dictionary, Rev. 4th Ed. (1968). This Court recently stated:

> [a] policeman's unarticulated plan has no bearing on the question whether a suspect was 'in custody' at a particular time; the only relevant inquiry is how a reasonable man in the suspect's position would have understood his situation.

Berkemer v. McCarty, 468 U.S. 420, 442, 104 S.Ct. 3138, 3151, 82 L.Ed.2d 317, ___ (1984). See also *United States v. Bengivenga*, 488 F.2d 593, 596-97 (5th Cir. 1988) (en banc). Stated differently, a person is arrested when a reasonable man in the same position would determine that he is no longer free to move without the consent of the officers. *United States v. Johnson*, 846 F.2d 279, 283 (5th Cir. 1988).

It cannot be seriously contended that any reasonable person in the victims' position would feel free to leave without the consent of the officers in the case at bar given that the victims were handcuffed at gunpoint. In any event, the court below did not need to reach the issue of whether the detention amounted to an arrest because genuine and material disputed issues of fact exist with regard to whether Petitioner Vanover even had sufficient

information to justify an investigatory stop. Therefore, the court below quite properly treated the respondents' detention by petitioners as an investigatory stop in dismissing the appeal without reaching the arrest issue.

It is clear that petitioners lacked a reasonable suspicion of criminal activity that was based on specific and articulable facts which, taken together with rational inferences from those facts, reasonably warrant the intrusion given that the facts must be judged against an objective standard. *Terry v. Ohio, supra,* 392 U.S. at 21, 88 S. Ct. at 1880, 20 L.Ed.2d at 906; *United States v. Lopez-Gonzalez, supra,* 916 F.2d at 1013; *United States v. Gomez, supra,* 776 F.2d at 546. Specifically, petitioners' sole justification for the initial stop is that the victims' vehicle matched a description provided to them by the Lufkin Police Department over twenty-four hours earlier that a shooting could occur at some unknown time in some unknown place in Nacogdoches. Of course, even this sole justification turned out to be untrue in light of the facts that the victims' car was not even the same color as the color of the suspect vehicle and the "suspect vehicle" had already left Lufkin, less than 25 miles from Nacogdoches, at the time the "suspect vehicle" description was received over 24 hours before the respondents' vehicle was stopped.

Even if the initial stop at gunpoint could be considered a justifiable investigatory stop, it is clear that the petitioners should have immediately released the victims after they realized that the car was the wrong color and Lampkin was the wrong sex. It is undisputed that Petitioner Vanover had the wrong color/wrong sex information before the victims were handcuffed and detained.

In summary, the initial stop was based on nothing more substantial than the hunches condemned in *Terry, supra,* and the victims' subsequent detention was certainly not supported by probable cause as that term is defined in *Beck, supra.*

Petitioner Shotwell's claim that he thought the candy mint inside the Lampkin/Daniels vehicle was crack cocaine strains credulity and, in any event, is largely irrelevant because Petitioner Shotwell admits he was able to determine by visual inspection at the scene that the candy was in fact candy and that the mint was not even submitted for analysis.

A primary reason for the reduced amount of information required for an investigatory stop as opposed to a warrantless arrest is because investigatory stops are generally less intrusive than arrests. Of course, the intrusiveness of the investigatory stop in the case at bar, assuming that it was an investigatory stop and not an arrest, was much greater than the intrusiveness of a typical arrest given that the victims were detained at gunpoint for many minutes and one of the victims had his head slammed against the car.

C. Petitioners are Not Entitled to Qualified Immunity In Their Individual Capacities Because They Violated Well-Established Law

Petitioners are not shielded by qualified immunity in their individual capacities because their unconstitutional acts violated well-established law. In *Harlow v. Fitzgerald,* 457 U.S. 800, 102 S.Ct. 2727, 73 L.Ed.2d 396 (1982) our

Supreme Court eliminated the subjective element previously incorporated into the qualified immunity/good faith defense. Specifically, the Court held that governmental officials are not able to hide behind the qualified immunity defense when their conduct violates clearly established constitutional rights. *Id.* 457 U.S. at 818, 102 S.Ct. at 2738, 723 L.Ed.2d at ___. Simply put, the subjective state-of-mind component of good faith immunity no longer exists and qualified immunity is defined in terms of objective *conduct*, not subjective state of mind. *Harlow, Id.; Mitchell v. Forsyth*, 472 U.S. 511, 517, 105 S.Ct. 2806, 2810-2811, 86 L.Ed.2d 411, ___ (1985).

In *Davis v. Scherer*, 486 U.S. 183, 191, 104 S.Ct. 3012, 3017, 82 L.Ed.2d 139, ___ (1984) the Supreme Court reiterated the simple test for qualified immunity:

> Whether an official may prevail in his qualified immunity defense depends upon the objective reasonableness of [his] conduct as measured by reference to clearly established law. No other circumstances are relevant to the issue of qualified immunity.

Id. (Parenthetical language and citations omitted.)

In *Malley v. Briggs*, 475 U.S. 335, 345, 106 S.Ct. 1092, 1098, 89 L.Ed.2d 271, ___ (1986) the Court once again rejected the attempt of a police officer to reverse the "objective good faith" concept developed in *Harlow*.

In summary, it is and was well established at all times relevant hereto that an investigatory stop is unlawful unless it is supported by sufficient facts to give rise to a reasonable suspicion and unless it is limited in scope. It is and was equally well established law that a warrantless

arrest in the absence of probable cause is unlawful. Therefore, if petitioners did what the victims have properly pled, introduced evidence of, and are prepared to prove that they did, they are not protected by qualified immunity because they violated well settled law.

CONCLUSION

Respondents respectfully pray that the petition for writ of *certiorari* be in all things denied for the reasons set out above.

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